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No. 54454-7-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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In re the Estate of MARY-LOUISE KORSTEN,

LOUANNE MARIE WHEELER,

Appellant

v.

MARIANNE RIOS, individually and in her capacity as Personal  
Representative of the Estate of Mary-Louise Korsten,

Respondent.

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BRIEF OF APPELLANT

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## I. INTRODUCTION

After a fall in 2008 at the age of 90 with her cognitive abilities declining, Mary-Louise Korsten (“Mrs. Korsten”) was diagnosed with dementia in 2010 and moved into Cedar Ridge, an assisted living facility. Her daughter, Louanne Wheeler (“Ms. Wheeler”), who was her primary caregiver at that point, continued to visit daily, took Mrs. Korsten to medical appointments, and provided regular continued care and assistance to her mother until April 2011, when she was summarily barred from any contact with her mother. The issues arose following a misunderstanding about funds Ms. Wheeler withdrew and later returned. In December 2011, when police investigators contacted Cedar Ridge to interview Mrs. Korsten regarding issues with her assets, Cedar Ridge told them Mrs. Korsten was not competent and investigators reported: “Korsten’s cognitive abilities made it unlikely that she would be of assistance.”

Five months later, at the direction of Mrs. Korsten’s granddaughter, Marianne Rios, attorney Eugene Hammermaster<sup>1</sup> drafted a new will (“the 2012 Will”) for Mrs. Korsten disinheriting Ms. Wheeler, who was to inherit 25% of the Estate under

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<sup>1</sup> In addition to representing Mrs. Korsten, Mr. Hammermaster also represented Ms. Wheeler, Ms. Rios, and Ms. Wheeler’s brother, Jack Korsten at various times. RP 299-312.

Mrs. Korsten's existing will, replacing her with Rios, who had never been included in any of Mrs. Korsten's previous wills. The attorney knew Mrs. Korsten had dementia, but did not meet with Mrs. Korsten to evaluate her cognitive state. Ms. Rios prodded Mr. Hammermaster about the will, drove to his office to pick up the will, then took it to Cedar Ridge where she shepherded staff into Mrs. Korsten's room to witness the will signing in July 2012 - months after investigators were told Mrs. Korsten was not competent to respond to questions about her financial assets and their use. Mrs. Korsten died in July 2013, and the 2012 Will was admitted to probate. Ms. Wheeler challenged the 2012 Will based on her mother's lack of capacity and Rios' undue influence. Following trial, the court found Mrs. Korsten had capacity and that the presumption of undue influence applied with respect to Ms. Rios, whom the court also found not to be a credible witness. However, the trial court found that the presumption of undue influence was overcome based on Mr. Hammermaster's testimony.

This appeal presents two significant issues: (1) was there substantial evidence to support the finding that Mrs. Korsten had capacity in July 2012; and (2) was there sufficient evidence to overcome the presumption that Ms. Rios exercised undue influence. Because the trial court committed error with regard to both issues, this Court should reverse and find the 2012 Will is not valid.

## II. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The trial court erred in entering the December 30, 2019 Findings of Fact (“FF”) and Conclusions of Law (“CL”), and its January 7, 2020 implementing Order, which operated as a final judgment in the TEDRA Petition contesting the will (CP 145-159, 160-61).

2. The trial court erred in concluding that Mrs. Korsten had testamentary capacity to execute a will on July 2, 2012 (CL 10, 27), (FF 51-54, 56). The following FFs or identified portions thereof are not supported by sufficient substantial evidence in the record as a whole. Specifically:

- a. The following portion of FF 51: “. . . Mrs. Korsten remained intellectually sharp in the last few years of her life and that at the time she was conferring with Mr. Hammermaster with regard [to revising her 2012 Will] . . . she was actively engaged in decision-making both with regard to the management of her estate and with regard to her estate planning.”
- b. The following portion of FF 52: “Mr. Hammermaster . . . in the course of drafting her 2012 Will [] spoke or met with Mrs. Korsten on several occasions to get her input

with regard to the terms of that Will and that [Mrs. Korsten] was actively engaged in decision-making concerning her estate.”

- c. The following portion of FF 53: “Mr. Hammermaster . . . saw no indication that Marianne Rios was exerting any influence—undue or otherwise—over Mrs. Korsten.”
- d. The following portion of FF 54: “. . . Mrs. Korsten made the decision to disinherit [Ms. Wheeler] because Mrs. Korsten was deeply troubled by [Ms. Wheeler’s] infidelity and her repeated attempts to wrongfully appropriate Mrs. Korsten’s monies.”
- e. The following portion of FF 56: “. . . Mrs. Korsten was as sharp and attentive as ever and understood what she was doing when she executed her 2012 Will.”

3. The trial court erred in concluding that Marianne Rios did not exercise undue influence over Mrs. Korsten with respect to the July 2, 2012 Will. (FF 28-33, 62, 65-66, 69-70 and CL 22, 23, 24 and 27).

- a. The following portion of FF 28: “During the remainder of 2011 and into 2012, Mrs. Korsten and Mr. Hammermaster engaged in correspondence and dialogue as to how Mrs. Korsten would respond to

[Ms. Wheeler's] misdeeds, and Mr. Hammermaster suggested that Mrs. Korsten could pursue criminal prosecution or she could consider amending her estate planning documents."(CP 149).

b. The following portion of FF 29: “. . . Mrs. Korsten informed Mr. Hammermaster that she desired to change her Will, and in April, 2012, she sent a note (which she signed and dated April 10, 2012) to Mr. Hammermaster instructing him to . . . add[] Marianne Rios as an Agent under her Power of Attorney . . . removing [Ms. Wheeler] as beneficiary under her Will, and replacing [Ms. Wheeler] with Marianne Rios as beneficiary. . . .” (CP 149).

c. The following portion of FF 30: “On several occasions in the spring of 2012, Mr. Hammermaster met with Mrs. Korsten and spoke with her on the phone to discuss the changes she wanted to make to her estate planning, which changes were consistent with the changes she had previously requested in the April 10, 2012 note that was sent to Mr. Hammermaster,” (CP 150).

- d. The following portion of FF 31: “On April 10, 2012, in front of Mr. Hammermaster, Mrs. Korsten executed a new Power of Attorney naming Jack Korsten and Marianne [] Rios as her Agents, each independent of the other.” (CP 150).
- e. The following portion of FF 32: “Mr. Hammermaster then prepared a revised [Will] for Mrs. Korsten that incorporated the changes that she had directed. . . .” (CP 150).
- f. The following portion of FF 33: “When Marianne Rios arrived at Mrs. Korsten’s residence on July 2, 2012, with the final draft of Mrs. Korsten’s new will, two of Mrs. Korsten’s caregivers, Jami Pitman and Amanda Wenz, volunteered to witness Mrs. Korsten’s execution of the Will.” (CP 150).
- g. The following portion of FF 62: “. . . Marianne Rios did not attend any of the meetings that [Mr. Hammermaster] had with Mrs. Korsten to discuss the provisions that Mrs. Korsten wanted to incorporate into her 2012 Will.” (CP 154).
- h. The following portion of FF 65 “. . . [T]his record lacks sufficient evidence that Mrs. Rios interfered with

Mrs. Korsten's free will and prevented the exercise of her judgment and choice." (CP 155).

- i. The following portion of FF 66: "The records also lacks sufficient evidence to find that Marianne Rios' actions were so importunate, persistent, or coercive that they effectively subdued and subordinated Mrs. Korsten's will and took away her freedom of action." (CP 155).
- j. The following portion of FF 69: ". . . [Mrs. Korsten] remained mentally sharp throughout her entire life, including into 2013." (CP 155).
- k. The following portion of FF 70: ". . . [Mrs. Korsten] was very independent in her decision-making and did not appear to be vulnerable to undue influence." (CP 155).

4. The Court erred in entering the following Conclusions of Law, which are not supported by substantial evidence or are based upon improper legal criteria:

- a. The trial court erred in ruling that (CL 10): "At that time she executed her [2012 Will], [Mrs. Korsten] possessed testamentary capacity to execute such Will." (CP 157).
- b. The trial court erred in ruling that (CL 22): "[Mrs. Rios] largely relies on the testimony of Mrs. Korsten's lawyer, Mr. Hammermaster, to rebut the presumption [of undue

influence] . . . [Mr.] Hammermaster testified that he saw no indication that Marianne Rios was exerting any influence—undue or otherwise—over Mrs. Korsten,” (CP 158).

- c. The trial court erred in ruling that (CL 23): “. . . Mrs. Korsten made the decision to disinherit [Ms. Wheeler] because Mrs. Korsten was deeply troubled by [Ms. Wheeler’s] infidelity and her repeated attempts to wrongfully appropriate Mrs. Korsten’s monies.” (CP 159).
- d. The trial court erred in ruling that (CL 24): “. . . [I]n the course of drafting her 2012 Will, [Mr. Hammermaster] spoke or met with Mrs. Korsten on several occasions to get her input with regard to the terms of that Will and that she was actively engaged in decision-making concerning her estate. None of those meetings included Mrs. Rios.” (CP 159).
- e. The trial court erred in ruling that (CL 27): “Petitioner [Ms. Wheeler] has failed to meet her burden of presenting clear, cogent, and convincing evidence to establish either that Mrs. Korsten lacked capacity to

execute her [2012 Will] or that Mrs. Korsten was unduly influenced when she executed her Will.” (CP 159).

Issues Pertaining to Assignments of Error

1. Did the trial court err in finding that Mrs. Korsten had capacity to execute a will in July 2012 when her caregivers had represented to police in December 2011 that she lacked sufficient cognition to be interviewed, her medical records confirmed longstanding dementia and cognitive issues, and the lay opinions offered did not have sufficient foundation to speak to whether Mrs. Korsten knew the extent of her property and family? (Assignments of Error 1, 2, and 4).

2. Did the trial court err in ruling that Marianne Rios, whom the court found to lack credibility, presented sufficient proof to overcome the *Dean v. Jordan*, 194 Wash. 661, 79 P.2d 331 (1938), presumption of undue influence? (Assignments of Error 1, 3, and 4).

3. Did the trial court fail to make proper findings to support a conclusion that Respondent, Personal Representative Marianne Rios, rebutted the presumption of undue influence? (Assignments of Error 3 and 4).

**III. STATEMENT OF THE CASE**

Mrs. Korsten died on July 11, 2013. CP 145 (FF 1). Mrs. Korsten’s July 2, 2012 Will was admitted to probate on August 5,

2013. CP 8-13; CP 145 (FF 2). The 2012 Will named Ms. Rios, who had never been a beneficiary in any previous will, to receive 50% of Mrs. Korsten's substantial estate and disinherited Ms. Wheeler entirely. CP 8-13. Ms. Wheeler filed a will contest on December 2, 2013, asserting Mrs. Korsten lacked testamentary capacity and the 2012 Will was the result of undue influence by Ms. Rios. CP 20-21. Trial lasted approximately three days in November 2019. CP 145. During trial the following evidence was presented regarding Mrs. Korsten's capacity and the circumstances surrounding the execution of the 2012 Will.

**A. Mrs. Korsten Suffered from Dementia and Significant Cognitive Decline Prior to Executing the 2012 Will**

Mrs. Korsten's primary care provider, Traci Mancuso, ARNP, diagnosed Mrs. Korsten with "probable early Alzheimer's dementia" on September 30, 2010. CP 151 (FF 38), Trial Exhibit No. 24. Mrs. Korsten's healthcare records from this time identify Mrs. Korsten's "problems with short term memory issues and getting easily confused often." *Id.* Ms. Mancuso prescribed Mrs. Korsten Aricept to treat her dementia. CP 151 (FF 38). Mrs. Korsten took Aricept daily at least through June 2012. CP 152 (FF 41). Ms. Mancuso testified that, in her professional opinion, Mrs. Korsten did not have

“sufficient mind and memory to understand transactions, such as creating a Will” at the time she executed the 2012 Will. RP 123.

Two of Mrs. Korsten’s long-time friends who had known her for decades, testified that Mrs. Korsten’s cognitive abilities declined sharply in the year preceding her death, such that Mrs. Korsten could not engage in or understand conversation and that Mrs. Korsten had become “just a shell” of who she once was. CP 152 (FF 43, 44); RP 159-160, 167-68, 170. Similarly, in 2011 Mrs. Korsten’s caregivers at Cedar Ridge told two detectives (investigating whether funds had been improperly taken from Mrs. Korsten’s account<sup>2</sup>) that “Mrs. Korsten’s cognitive abilities made it unlikely that she would be of assistance.” Trial Exhibit 32; CP 149 (FF 26). The detectives did not interview Mrs. Korsten because of the assessment by Mrs. Korsten’s caregivers’ that she lacked the cognitive abilities to respond to such questions. *Id.* While Ms. Rios testified that Mrs. Korsten remained cognitively sharp, the trial court concluded that Ms. Rios’ testimony lacked all credibility. CP 149-151 (FF 29, 34, 37); CP 158 (CL 17).

**B. Mr. Hammermaster Only Had Indirect Communications with Mrs. Korsten Regarding Changes to Her Will**

Mr. Hammermaster knew Mrs. Korsten was diagnosed with dementia. RP 366. He knew she had dementia before he drafted

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<sup>2</sup> The funds were later returned when a dispute arose.

changes to Mrs. Korsten's Powers of Attorney in April 2012. *Id.* Mr. Hammermaster testified he employs different procedures to probe capacity if a client has dementia or Alzheimer's, but he admitted that he did not use those procedures to test Mrs. Korsten's cognitive abilities in July 2012 when the Will was signed. RP 396-97.

The first notice of some desire by Mrs. Korsten to change her will occurred in April 2012, two years after Mrs. Korsten's dementia diagnosis, when Mr. Hammermaster saw Mrs. Korsten on a "social visit," and the two discussed removing Ms. Wheeler from Mrs. Korsten's will. RP 360. Mr. Hammermaster testified Mrs. Korsten was "unclear" as to whom she wanted to replace Ms. Wheeler in the will during their social visit. *Id.* Soon after this "social visit" Mr. Hammermaster received a handwritten note – that was not in Mrs. Korsten's handwriting – containing instructions to remove Ms. Wheeler from her will and to substitute Ms. Rios in her place. CP 149 (FF 29). The note states, "if there is [sic] any questions, please ask Marianne [Rios]." RP 388; Trial Exhibit 29. It is undisputed that Mrs. Korsten did not author the note. CP 149 (FF 29).

Mr. Hammermaster did not ask Mrs. Korsten who authored the note even though he recognized the note was not in Mrs. Korsten's handwriting. RP 388-389. Ms. Rios testified she was not aware of the note, but the trial court concluded that Ms. Rios' testimony lacked

credibility and that Ms. Rios authored the note. CP 149-150 (FF 29, 34); CP 158 (CL 17).

Mr. Hammermaster testified he spoke to Mrs. Korsten one time over the phone after receiving the April 2012 note. RP 362-363, 389. Mr. Hammermaster testified Mrs. Korsten was extremely hard of hearing, and he was hard of hearing as well; thus, no substantive discussion of the will occurred during his single phone call with Mrs. Korsten. RP 362-363, see also RP 252, RP 474. Mr. Hammermaster and Mrs. Korsten had no further verbal communication regarding the 2012 Will after this phone call. RP 362-365. His only communication with her on the subject was in passing at an April 2012 "social visit". RP 360. Ms. Wheeler had no communication with Mrs. Korsten after April 2011 because Ms. Wheeler was barred from visiting Cedar Ridge; the trial court noted Ms. Rios was likely the family member who instructed Cedar Ridge to bar Ms. Wheeler from the facility. CP 151 (FF 40).

All further communications involving changes to Mrs. Korsten's will were transmitted to Hammermaster's office through Ms. Rios. RP 389-390. Ms. Rios frequently contacted the Hammermaster law office to discuss the changes to Mrs. Korsten's will. CP 150-51 (FF 34). While Mr. Hammermaster never spoke to Ms. Rios directly about the 2012 Will, Ms. Rios contacted his staff about the status of the will.

RP 368, 370. In July 2012 Ms. Rios went to the law office to pick up the will and took the will to Mrs. Korsten's assisted living center. *Id.* Ms. Rios then marshalled caregivers to witness Mrs. Korsten's execution of the will. RP 50. Mr. Hammermaster was not present for the execution of the will in July 2012. RP 363. Ms. Rios delivered the executed 2012 Will to Mr. Hammermaster's office. CP 150-51 (FF 34). Mr. Hammermaster never evaluated Mrs. Korsten's competency to execute the 2012 Will at or near the time of its execution. RP 396-97.

**C. Procedural History**

At the conclusion of trial, the trial court found that Mrs. Korsten had capacity when she executed the July 2012 Will. CP 157 (CL 10). The trial court further found that the facts presented gave rise to a presumption of undue influence on the part of Ms. Rios. CP 158 (CL 11-21). The trial court then concluded, despite substantial evidence supporting the presumption of undue influence and the trial court's own finding that Ms. Rios' testimony was not credible, that the influence exerted by Ms. Rios was not sufficient to overcome Mrs. Korsten's free will. CP 159 (CL 26); see also CP 149-151 (FF 29, 34, 37); CP 158 (CL 17).

The trial court correctly acknowledged that Ms. Rios' conduct and relationship with Mrs. Korsten gave rise to a presumption of undue influence. However, the trial court erroneously concluded, relying solely

on the testimony of Mr. Hammermaster, that the presumption of Ms. Rios' undue influence was rebutted. CP 158 (CL 20, 21).

Ms. Wheeler timely filed a notice of appeal of the trial court's Order and Memorandum of Decision with Findings of Fact and Conclusions of Law entered by the trial court on December 30, 2019, and the trial court's final judgment of January 7, 2020. (CP 145-161), Notice of Appeal, Docket No. 119.

#### IV. ARGUMENT

##### A. **The Standard of Review.**

Whether a person had "the capacity to make a will is an issue of fact." *In re Estate of Kessler*, 95 Wn. App. 358, 373, n. 28, 977 P.2d 591 (1999) (citing *In re Estate of Johanson*, 178 Wash. 628, 629, 35 P.2d 52 (1934)). However a trial court's conclusions regarding undue influence present a mixed question of fact and law. *In re Estate of Melter*, 167 Wn. App. 285, 300, 273 P.3d 991 (2012).

This Court reviews challenged findings of fact for substantial supporting evidence. See, e.g., *id.* at 301; *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992). Legal conclusions are reviewed de novo. *Wenatchee Sportsmen Ass'n v. Chelan Cnty.*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

**B. Substantial Evidence Does Not Support the Trial Court's Conclusion that Mrs. Korsten Had Capacity to Execute a Will in July 2012.**

To void the 2012 Will based on Mrs. Korsten's lack of capacity, Ms. Wheeler must demonstrate Mrs. Korsten was of unsound mind when she executed the will, and this unsoundness "was of such a character that [she] had no reasonable perception or understanding of the nature and terms of the [will]." *Page v. Prudential Life Ins. Co. of Am.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942). A signer must possess sufficient mind or reason to enable [her] to comprehend the nature, terms, and effect of the contract in issue." *Id.* The signer's mental capacity at the moment of the transaction is the determinative factor. *Kessler, supra* at 371. A radical departure from a previous testamentary plan can support the inference that the will was a product of an unsound mind. *Id.*

The relevant inquiry is whether there is substantial evidence that Mrs. Korsten had the ability to understand the nature, terms and effect of the July 2012 Will. See *Page v. Prudential Life Ins. Co.*, 12 Wn.2d 101, 109, 120 P.2d 527 (1942) (stating "[t]he rule relative to mental capacity to contract . . . is whether the contractor possessed sufficient mind or reason to enable him to comprehend the nature, terms and effect of the contract in issue"). The quantum of proof required to prove competency is clear, cogent and convincing

evidence. *Id.* at 109; accord *Grannum v. Berard*, 70 Wn.2d 304, 307, 422 P.2d 812 (1967) (citing *Page, supra*). This requires evidence that is more substantial than an ordinary civil case where requisite quantum of proof is only a preponderance of the evidence. See, e.g. *B.P. v. H.O.*, 186 Wn.2d 292, 313, 376 P.3d 350 (2016).

Substantial evidence must be “highly probable” to satisfy this level of proof. See, e.g., *Marriage of Schweitzer*, 132 Wn.2d 318, 329-30, 937 P.2d 1062 (1997). Furthermore, substantial evidence review should be even more stringent in the fiduciary context than it is outside of the fiduciary context. See, e.g., *Wilkins v. Lasater*, 46 Wn. App. 766, 778, 733 P.2d 221 (1987) (noting “the increased burden of proof” placed on a fiduciary, and discounting self-serving testimony of fiduciary in the absence of supporting documentary evidence). Here, there is no evidence from Mr. Hammermaster (or any other witness) that Mrs. Korsten was of a sound mind in July 2012 or that she understood the nature, terms and effect of the 2012 Will when Ms. Rios and put it in front of her to sign.

**1. Substantial Evidence Does Not Support the Trial Court’s Conclusion that Mrs. Korsten Was of Sound Mind When She Executed the July 2012 Will.**

Here, the trial court based its finding that Mrs. Korsten had capacity when she executed the 2012 Will on the lay opinions of witnesses who did not have sufficient foundation to speak as to

whether Mrs. Korsten knew the extent of her property and family. CP 153-54 (FF 51-54, 56). The trial court relied primarily upon the testimony of Mr. Hammermaster who had only indirect or remote communications with Mrs. Korsten regarding the 2012 Will. CP 153 (FF 51-54). Mr. Hammermaster's limited contact with Mrs. Korsten rendered him incapable of evaluating Mrs. Korsten's cognitive abilities. His only substantive contact in that time frame was a social visit in April 2012. Moreover, many of Mr. Hammermaster's "communications" with Mrs. Korsten were filtered through or originated from Ms. Rios. CP 158 (CL 17). The single phone call that occurred after Mr. Hammermaster received the April 2012 request did not involve any substantive discussion of the 2012 Will. RP 362-363. Mr. Hammermaster and Mrs. Korsten had no further communication regarding the 2012 Will after this phone call. RP 362-65.

The trial court also cited to the testimony of Jami Pitman and Amanda Wenz in support of its determination Mrs. Korsten had capacity. CP 153-54 (FF 56). Both Ms. Pitman and Ms. Wenz lack sufficient foundation to opine on Mrs. Korsten's capacity. CP 153-54 (FF 56). Ms. Pitman, Cedar Ridge's Care Coordinator, was not involved in day-to-day interactions at Cedar Ridge. She testified that her basis for believing Mrs. Korsten's cognitive functions remained intact was the fact that at some point in time Mrs. Korsten commented if butter

was missing from her toast. RP 46-47. She could not identify any other factual basis for her opinion that Mrs. Korsten's cognitive abilities were intact in July 2012, and no knowledge that would address whether Mrs. Korsten knew the nature and extent of her assets, her family, or the impact of the 2012 Will.

Similarly, Amanda Wenz, who worked as a nurse at Cedar Ridge on and off between 2010 and 2017—but who could not recall the years she worked at Cedar Ridge or specifically when she interacted with Mrs. Korsten—testified Mrs. Korsten was cognitively sharp because she saw Mrs. Korsten read the newspaper. However, Ms. Wenz testified she did not have any meaningful discussions with Mrs. Korsten about the news or any other topic. RP 78, 82. Ms. Wenz also recalled an anecdote in which Mrs. Korsten was able to recognize that one of her medications was missing, but could not place this event in time. RP 201. Moreover, Ms. Wenz acknowledged Mrs. Korsten could not identify the missing medication and did not communicate what type of medication was missing. *Id.* Again, she provided no evidence to support the cognitive abilities of Mrs. Korsten in July 2012.

Mr. Hammermaster, Ms. Wenz, and Ms. Pitman lacked sufficient factual bases to testify whether Mrs. Korsten knew the extent of her family and property, and instead based their lay opinion on their superficial, brief interactions with Mrs. Korsten that amounted to less

than “small talk.” The testimony of Mr. Hammermaster, Ms. Pitman, and Ms. Wenz, taken cumulatively, does not constitute substantial evidence that Mrs. Korsten had capacity when balanced against the uncontested documentary and testimonial evidence from Mrs. Korsten’s healthcare providers showing that Mrs. Korsten was in sharp cognitive decline at the time she signed the 2012 Will and lacked capacity. It is also completely inconsistent with the facts represented to the investigators in December 2011 by Cedar Ridge: that Mrs. Korsten would not have the cognitive abilities to explain any issues regarding her financial assets and whether she authorized Mrs. Wheeler to make a withdrawal.

In contrast to the lay witness testimony, Mrs. Korsten’s primary care provider and other healthcare providers at Cedar Ridge recognized Mrs. Korsten’s longstanding dementia, cognitive issues, and inability to appreciate the extent of her property and family. Mrs. Korsten’s healthcare records similarly document her significant cognitive decline beginning in 2010.

Specifically, in 2010 Mrs. Korsten reported confusion and memory loss to her primary care provider, Ms. Mancuso. After evaluating Mrs. Korsten’s cognitive abilities, Ms. Mancuso diagnosed Mrs. Korsten with dementia. Ms. Mancuso prescribed Mrs. Korsten Aricept, a drug used to treat people with dementia. CP 151 (FF 38).

Moreover, Ms. Mancuso testified Mrs. Korsten did not have “sufficient mind and memory to understand transactions, such as creating a Will” when Mrs. Korsten executed the 2012 Will. RP 123.

Similarly, in January 12, 2011, Mrs. Korsten’s caregivers at Cedar Ridge told detectives investigating a disagreement involving Mrs. Korsten’s funds that “Mrs. Korsten’s cognitive abilities made it unlikely that she would be of assistance.” Trial Exhibit No. 32; CP 149 (FF 26). The detectives did not interview Mrs. Korsten based on Cedar Ridge’s representation that Mrs. Korsten’s cognitive abilities were not intact.

In addition, records from Cedar Ridge dated July 6, 2012—four days after Mrs. Korsten executed the 2012 Will—note “[e]vidence of short-term memory loss” and that Mrs. Korsten “is not oriented to . . . time” and that her “**[a]bility to make decisions about daily life is poor, requires reminders, cues and supervision** in planning daily routines.” CP 153 (FF 55) (emphasis added). Lastly, the testimony of two of Mrs. Korsten’s lifelong friends, was that she was a shell of her former self by 2010. RP 159-160, 167-68, 170. Mrs. Korsten could not properly groom herself. *Id.* She could not carry on conversations. *Id.*

There is not substantial evidence to support the trial court’s finding that Mrs. Korsten had capacity to understand the nature of her property and family when she signed the 2012 Will. The balance of

evidence supports that Mrs. Korsten did not have testamentary capacity.

**2. The Sudden Disinheritance of Mrs. Korsten's Only Daughter is Additional Evidence of Mrs. Korsten's Lack of Capacity**

“[A] a radical departure from a prior testamentary scheme supports an inference that the later will is the product of an unsound mind.” *In re Estate of Kessler, supra* at 371 (citing *In re Estate of Landgren*, 189 Wash. 33, 38, 63 P.2d 438 (1936) (“In considering testamentary capacity at any particular date, it is proper to consider the previously expressed wish of the alleged testator.”)).

Mrs. Korsten regularly revised her will since its creation in 1993. CP 146 (FF 7). Mrs. Korsten created a trust for Ms. Wheeler in 1992. CP 146 (FF 6). In 1994, Mrs. Korsten authorized a codicil modifying distributions to Ms. Wheeler. CP 147 (FF 10). In September 2010, Ms. Wheeler's trust was distributed to her. CP 148 (FF 19). It was not until April 2012, two years after Mrs. Korsten's dementia diagnosis and longstanding cognitive decline, that Mrs. Korsten disinherited her only daughter, a radical departure from Mr. Korsten's previous testamentary schemes. This coincided with Ms. Rios' barring Ms. Wheeler from Cedar Ridge and her direct involvement in procuring changes to Mrs. Korsten's will substituting Ms. Rios as a beneficiary.

Mrs. Korsten also frequently made changes to her Powers of Attorney to reflect various disagreements with her two children, Jack Korsten and Ms. Wheeler. CP 147-148 (FF 13, 14, 17, 18, 22). Mr. Hammermaster made at least five changes to Mrs. Korsten's Powers of Attorney in which both Jack Korsten and Ms. Wheeler were either added or removed at various times. CP 147-148 (FF 13, 14, 17, 18, 22). Even though Mrs. Korsten had disagreements with her children, up until April 2012 Mrs. Korsten never expressed any intention to disinherit either child.

Because both her children had authority to act with respect to her bank accounts, and in light of Mrs. Korsten's failing memory or abilities, she would disagree with an action with respect to her account, remove them from the account, then later change her mind. In June 2010 Jack Korsten removed \$500,000, without authorization, from Mrs. Korsten's bank account, resulting in Mrs. Korsten revoking Jack Korsten's Power of Attorney in 2010. CP 148 (FF 18). Mrs. Korsten did not, however, disinherit Mr. Korsten.

When a similar situation arose with Ms. Wheeler (involving far less money) Mrs. Korsten initially changed the power of attorney. But the later sudden disinheritance of Ms. Wheeler is additional evidence of Mrs. Korsten's unsound mind. Every previous iteration of Mrs. Korsten's will named Ms. Wheeler as beneficiary. Ms. Rios was

never a beneficiary in any previous will. Here, the trial court's finding that Mrs. Korsten had capacity is not supported by substantial evidence. The trial court's order should be reversed.

**C Even if Mrs. Korsten Had Capacity to Execute a Will in July 2012, There Is Insufficient Evidence to Overcome the Presumption that Ms. Rios Exercised Undue Influence.**

**1. The Trial Court Concluded Ms. Rios' Conduct Gave Rise to a Presumption of Undue Influence.**

A combination of facts or circumstances may, in and of themselves, raise suspicion or concern that a will is the product of undue influence. *Dean v. Jordan*, 194 Wash. 661, 671-72, 79 P.2d 331 (1938). Moreover, in the absence of rebuttal evidence, the combination of suspicious facts "may even be sufficient to overthrow the will." *Id.* at 672. If the facts raise a presumption of undue influence, the burden of production shifts to the will proponent, who must then rebut the presumption with evidence sufficient to "balance the scales and restore the equilibrium of evidence touching the validity of the will." *Mueller v. Wells*, 185 Wn.2d 1, 15, 367 P.3d 580, 586 (2016) (quoting *Dean*, 194 Wash. at 672).

The *Dean* court identified several factors that give rise to a presumption of undue influence. The primary factors include the existence of a fiduciary relationship between testator and beneficiary, the beneficiary's participation in the preparation or procurement of the

will, and where the beneficiary receives an unusually or unnaturally large part of the estate. *Dean*, 194 Wash.at 671-72. The other factors to consider include the age, health, and cognitive ability of the testator, the relationship between the testator and beneficiary, the opportunity to exert undue influence, and the irregularity of the will. *Id.*

Every factor identified by the *Dean* court giving rise to a presumption of undue influence is present here. The trial court correctly acknowledged the presumption of Ms. Rios' undue influence and recognized that the burden shifted to Ms. Rios to rebut this presumption. CP 158 (CL 21). Specifically, the trial court identified the following uncontested facts that give rise to the presumption of Ms. Rios' undue influence: (1) Ms. Rios had a fiduciary relationship with Mrs. Korsten; (2) Ms. Rios actively participated in procuring the changes to Mrs. Korsten's will; (3) Ms. Rios repeatedly contacted the Hammermaster law office to request completion of the changes to Mrs. Korsten's will; (4) Ms. Rios picked up and dropped off the 2012 Will; (5) Ms. Rios likely authored the April 2012 note that instructed Mr. Hammermaster to disinherit Ms. Wheeler and substitute Ms. Rios as beneficiary; (6) Ms. Rios received an unusually large part of the estate—half, after not being mentioned in previous version of the will at all; (7) Ms. Rios was with Mrs. Korsten on a near daily basis “giving Ms. Rios the opportunity to exert undue influence;” and

(8) “Mrs. Korsten was in her nineties, suffered from dementia and relied on others [such as Ms. Rios] for her daily needs.” CP 157-58 (FF 11, 16-20).

**2. Sufficient Evidence Does Not Exist to Rebut the Presumption of Ms. Rios’ Undue Influence.**

While the overall burden of establishing undue influence remains with Ms. Wheeler, once the presumption of Ms. Rios’ undue influence is established the burden shifts to Ms. Rios to rebut that presumption. *Mueller, supra* at 15. Here, the trial court erroneously concluded the presumption of Ms. Rios’ undue influence was rebutted. CP 159 (CL 26).

In support of its conclusion that Ms. Rios rebutted the presumption of undue influence, the trial court cites only to the testimony of Mr. Hammermaster. CP 158-59 (CL 22). However, Mr. Hammermaster lacked the ability to recognize whether Ms. Rios interfered with Mrs. Korsten’s free will or prevented the exercise of Mrs. Korsten’s judgment or choice. Mr. Hammermaster had limited interaction with both Mrs. Korsten and Ms. Rios that precluded him from recognizing whether Ms. Rios exercised undue influence over Mrs. Korsten.

For example, Mr. Hammermaster testified he only witnessed Ms. Rios in the presence of Mrs. Korsten four or five times and that he

only engaged in superficial conversation with Ms. Rios. RP 370-71. More importantly, Mr. Hammermaster had only indirect or remote communications with Mrs. Korsten regarding changes to her will. When Mr. Hammermaster met with Mrs. Korsten in April 2012 on a “social visit,” Mrs. Korsten was “unclear” as to who she wanted to replace Ms. Wheeler in the will. RP 360. The next “communication” he had with Mrs. Korsten was the April 2012 note, which was not authored by Mrs. Korsten, instructing him to remove Ms. Wheeler from her will and substitute Ms. Rios in her place. CP 149 (FF 29).

Even though Mr. Hammermaster knew Mrs. Korsten had dementia, that she did not author the note, and that the note instructed him to contact Ms. Rios with any questions, Mr. Hammermaster did not take any steps to determine who authored the note or to confirm Mrs. Korsten agreed with its instructions. RP 388-389. He did not employ any special procedures to test Mrs. Korsten’s cognitive abilities. RP 396-97. Even when faced with the most blatant evidence of undue influence, Mr. Hammermaster testified he did nothing.

Mr. Hammermaster testified he had one additional conversation with Mrs. Korsten after receiving the April 2012 note. RP 362-363, 389. However, he acknowledges that both he and Mrs. Korsten were hard of hearing, and that no substantive discussion

of Mrs. Korsten's will occurred during the phone call. RP 362-363. Mr. Hammermaster and Mrs. Korsten had no further verbal communication regarding the 2012 Will after this phone call. RP 362-65. Mr. Hammermaster did not even attend the will execution. RP 363. Despite being Mrs. Korsten's fiduciary, Mr. Hammermaster took no actions to confirm the changes to Mrs. Korsten's will were based on Mrs. Korsten's own free will.

Further communications involving changes to Mrs. Korsten's will were transmitted to Hammermaster's office by Ms. Rios. RP 389-90. There were no communications between Mr. Hammermaster and Mrs. Korsten directly. *Id.* Ms. Rios frequently contacted the Hammermaster law office to discuss the changes to Mrs. Korsten's will. CP 150-51 (FF 34). She called Hammermaster's law office to request completion of the changes to Mrs. Korsten's will. CP 158 (FF 17). Mr. Hammermaster never spoke to Ms. Rios directly. RP 368, 370. Ms. Rios went to the law office to pick up the will. *Id.* Ms. Rios took the will to Mrs. Korsten's assisted living center. *Id.* Ms. Rios marshalled caregivers to witness Mrs. Korsten's execution of the will and delivered the executed will to Mr. Hammermaster's office. RP 50, CP 150-51 (FF 34). Moreover, Mrs. Korsten's dementia and cognitive decline rendered her susceptible to Ms. Rios' undue influence.

Mr. Hammermaster's interactions with Mrs. Korsten regarding the 2012 Will were peripheral. If undue influence factually occurred, Mr. Hammermaster would not have been able to recognize it due to his limited and peripheral communications with Mrs. Korsten. Mr. Hammermaster's testimony, by itself, is insufficient to rebut the presumption of undue influence.

Moreover, because the trial court failed to cite any other evidence other than Mr. Hammermaster's testimony, the trial court failed to make proper findings to support a conclusion that respondent rebutted the presumption of undue influence by Ms. Rios. While Ms. Rios testified that Mrs. Korsten remained cognitively sharp, the trial court concluded that Ms. Rios' testimony lacked all credibility, and it was completely self-serving to further her ability to inherit under an invalid will. CP 149-151 (FF 29, 34, 37); CP 158 (CL 17). The trial court should be reversed.

**D RAP 18.1 REQUEST FOR FEES.**

Assuming that this Court reverses the trial court, Ms. Wheeler will be the prevailing party on appeal and seeks her attorneys' fees and costs both on appeal and in the trial court as authorized by RCW 11.24.050.

V. CONCLUSION

For the reasons stated above, Appellant respectfully requests that the Court reverse the trial court's order and because the trial court erred by entering findings that Mrs. Korsten had capacity when she executed the 2012 Will without substantial evidence to support such findings. Moreover, even if Mrs. Korsten had capacity, this Court should reverse the trial court because of the uncontroverted undue influence exerted by Ms. Rios and the trial court's error in finding that Respondent overcame the presumption that the 2012 Will was a product of the undue influence of Marianne Rios. Consistent with this instruction, the trial court should be instructed to reconvene to determine whether Mrs. Korsten's 1993 will and its codicil should be admitted to probate or whether Mrs. Korsten's estate should pass by intestate succession.

Respectfully submitted this 20<sup>th</sup> day of May 2020.

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**DECLARATION OF SERVICE**

I declare, under the penalty of perjury under the laws of the State of Washington, that a true and correct copy of the BRIEF OF APPELLANT was delivered to the following in the manner described below:

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DATED this 21<sup>st</sup> day of May, 2020.

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**GORDON THOMAS HONEYWELL LLP**

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